





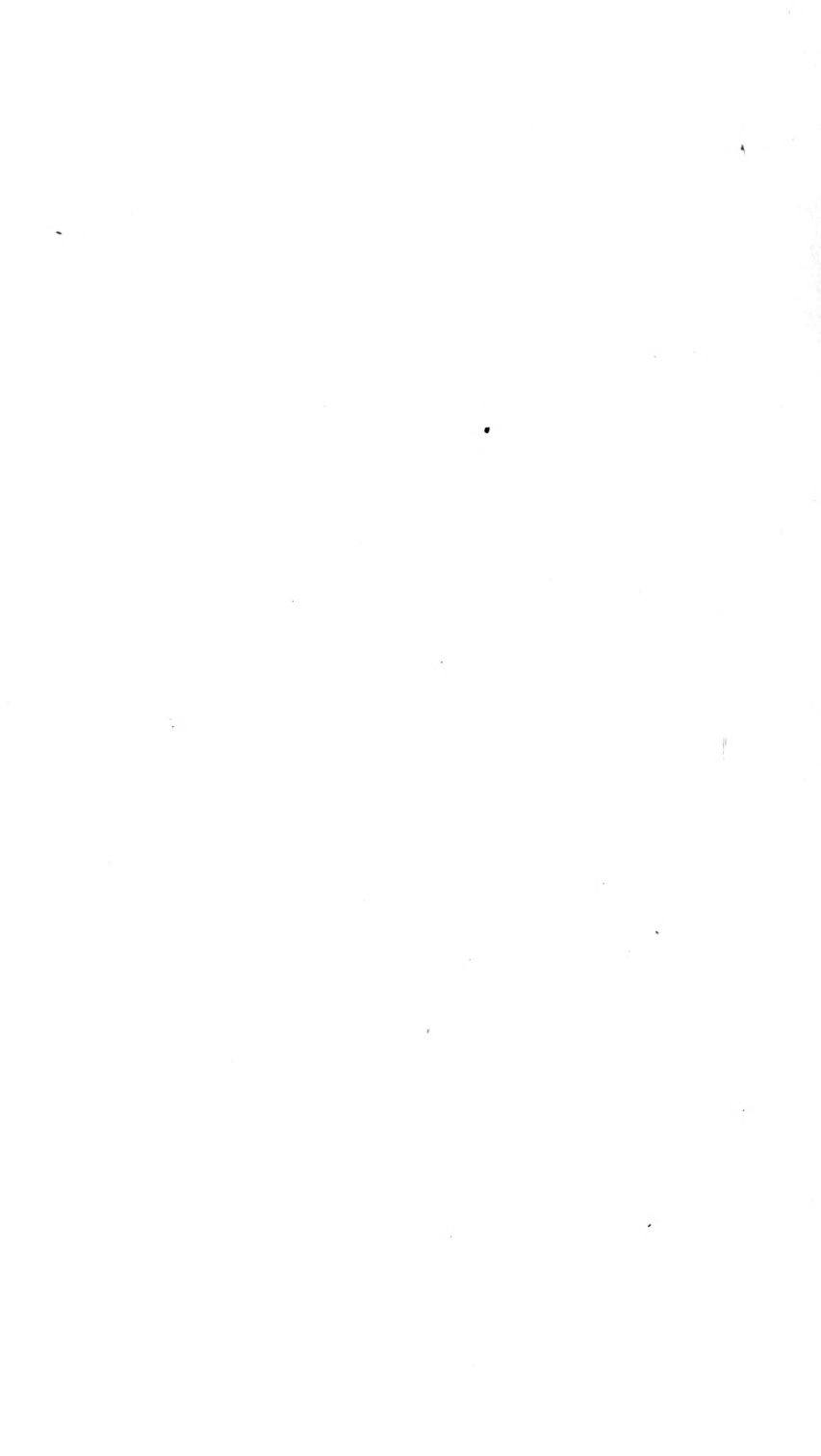








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# LAW AND HISTORY.

By WALTER B. SCAIFE, LL. B.; PH. D. (VIENNA).

"The laws of a nation form the most instructive part of its history."—*Gibbon*.

"Wie das Volk, so das Recht, und wie das Recht, so das Volk, so dass erst durch die Erkenntniss der übrigen Seiten des nationalen Lebens die Natur des Rechts, und durch diese umgekehrt wieder, die Eigenthümlichkeit und das Wesen des Volks verständlich wird."—*Wilhelm Arnold*.

Since the days of Savigny it has gradually become generally recognized that the historical method of investigation is necessary to a thorough understanding of the law; on the other hand eminent historians have acknowledged their obligation to the law books for valuable information. Sir Henry Maine, in his "Ancient Law," first published in 1861, showed practically how a masterly historical work may be founded on a study of the law. Various constitutional histories of high merit, based on public law, parliamentary debates, etc., have of late years appeared and been widely read. But there is another side to the subject which as yet seems to have attracted but comparatively little attention. Aside from those laws directing the action of government, whose working is patent to every observer, there is in each country a great body of private law, which, governing the daily actions of the people, has its silent, inconspicuous, but none the less sure and weighty influence upon the national development. The growth of custom into law and the latter's embodiment in institutions appear to the present writer to form the very kernel of history; while the reigns of kings, the ordinary meetings of parliaments, the lives of prominent personages, are merely the outer covering. In the obscure lives of the masses, is to be sought the hidden centre of action, whose nature, and not that of the surface, determines the main lines of historical development. This is true not only in countries where the people, through their representatives, take an active part in the work of governing, but even in those under despotic rule; as is shown by the powerlessness of imperial decrees to stop such movements as the growth of Christianity in ancient Rome, or the spread of democratic ideas in Russia to-day. In the evolution of societies as in that of plants and animals, it is the qualities and environments common to the great masses of individuals which determine the nature of the species; and not those uncommon, striking characteristics which may bring a few individuals into prominence. The latter, it is true, may sometimes be indicative of new conditions of life; and their possessors, accordingly, the first beginnings of a new species of plants or animals; or in national development, they may be the forerunners of a new political era. But they are rather the first fruits of the silent workings of the past, than the sole cause of the changes that are to follow.

How then are we to get at this life of the masses in historical investigation? The sources of information are various. Though it is their uncommon qualities which bring individuals into prominence, such persons must still have intercourse with the great masses by whom they are surrounded, and must themselves possess most characteristics in common with their humbler contemporaries; hence biographies can be of great service in this field of investigation. But the writing of biographies occurs only in an advanced stage of a nation's development, and accordingly the historian finds this a comparatively limited source of knowledge. Records of the doings of governing bodies and of the proceedings in courts of justice are a still more valuable and extensive storehouse for the historical investigator. There are many rules, however, regulating the daily conduct of the masses, which find no place here. Whether or not these rules can properly be looked upon as law, it is at times scarcely possible to decide. The origin of any particular customary law is often difficult, if not impossible to discover. The general course of the development of such law is, however, easy of comprehension. The original idea occurs to some one, perhaps an obscure individual; then finds acceptance among his neighbors, and later extends itself wide enough to become a fashion; receiving from time to time modifications through the influence of other minds and new conditions. Having some quality by which it attaches itself to the community, it acquires permanency in an institution, which then in its turn is recognized by the ruling powers as the embodiment of certain legal conceptions.<sup>1</sup> In the primitive stages of society, practically the whole life is strictly regulated by custom, which is really unwritten law. Here fashion, religion and law are so intimately interwoven that it is impossible to separate the different elements. The slow process of national development is accompanied by differentiation of the elements of national life; fashion becomes an ephemeron; religion, always battling for the mastery of the whole, slowly recedes to its place of governing only its particular institutions and regulating the inner life of its adherents;<sup>2</sup> while the law gradually assumes the special regulation of certain, the protection of all, the relations of life. In order to the proper exercise of these functions, the law must embody all that is permanent in the life of the people; hence arises its usefulness as the best instructor in the most valuable kind of history.<sup>1</sup>

Though this is true in general, the fact must not be lost sight of, that the value of the laws of various countries for the historical student is not always the same. In ancient Egypt, for instance, law was largely absorbed in reli-

<sup>1</sup> This idea is elaborately treated in von Ihering's *Zweck im Recht*, 2d vol., under the heading, "Die Theorie der Sitte."

<sup>2</sup> Buckle, *History of Civilization in England*, I., 353, speaking of the recent history of England, says:—"Within the short space of three centuries, the old theological spirit has been compelled, not only to descend from its long established supremacy, but to abandon those strongholds to which, in the face of advancing knowledge, it has vainly attempted to secure a retreat. All its most cherished pretensions it has been forced gradually to relinquish."

gion, the priests being the sole depositaries of the knowledge of both,<sup>1</sup> and divulging only so much as served to keep the people in a degraded condition and subject to strict control. No one denies the political activity of the Greeks; but as their legal work produced no great system of laws,<sup>2</sup> the study of the law as a source of Grecian history, has been comparatively neglected in favor of the more striking triumphs of their philosophy and art. But if Greek law gave nothing else to the world at large, it furnished the inspiration of Aristotle's *Politics*, which has been by no means without influence. Rome, however, was the great law-giver of the ancient world, and has been the source of much that is most valuable in the law of modern Christendom.<sup>3</sup> As the genius of Athens found its best expression in art, so the genius of Rome reached its highest development in law. This fact is universally recognized, so it is not necessary to dwell upon the subject. During the Middle Ages the law gradually moulded itself into that complex of institutions embraced under the name, feudalism. How much feudalism was the product of Roman law, or how much was due to primitive Germanic institutions, it is not here the place to discuss; but that the law, in the broad sense in which the term is here employed, contains the best materials for the history of that period can scarcely be denied.<sup>4</sup> In the modern world, the records of the proceedings of legislative bodies, executive officers and courts of justice form, without any doubt whatever, the weightiest and most reliable sources of information for the historian.

There are two ways of investigating the laws for historical purposes. The first and simpler is merely to look on the surface for bare facts. Whether or not there is much to be found in this manner depends on the genius and practice of the people whose laws are under consideration. England, for example, has stored up in her records a vast amount of information as to the lives of her people. As a conservative nation, she has generally sought the reasons therefor, when changing the law; and these reasons, the circum-

<sup>1</sup> Wilkinson, *The manners and customs of the ancient Egyptians*. Birch's edition, I., 186, 293.

<sup>2</sup> "Ein solches Rechtsvolk wie die Römer sind die Griechen allerdings nicht, namentlich ausdem Grunde, weil der Begriff der Rechtspersönlichkeit bei ihnen noch keineswegs völlig entwickelt erscheint." Karl Friedrich Hermann über Gesetz, Gesetzgebung und gesetzgebende Gewalt im griechischen Alterthume.

<sup>3</sup> Sir Henry Maine [*Ancient Law*, Preface to the first edition] speaks of the Roman law as "supplying from its later rules the staple of the civil institutions by which modern society is even now controlled."

<sup>4</sup> As to the West Goths Dahn writes:—"Auch sonst Kennzeichnen Kindasvinths Principien seine zahlreiche Gesetze; dieselben wurden, so hat man mit Recht bemerkt, auch ohne die Ueberlieferung Fredigars, uns vollständige Einsicht in sein Zeitalter und—fügen wir hinzu—in seine innere Politik gewähren." Bluntschli, *Lehre vom modernen Staat*, I., 133. "Die ganze Rechtsbildung hatte während des Mittelalters einen ständischen Ausdruck und eine ständische Färbung bekommen. Wie jeder Stand seine eigene Tracht, so hatte jeder Stand auch sein besonderes Recht und seine ihm eigene Rechtspflege. Der Klerus lebte nach kanonischem Recht, die Fürsten nach Herrenrecht, die Ritter hatten ihr Lehnrecht, die Dienstleute ihr Dienstrecht, für die Bürger galt das Stadtrecht und für die Bauern das Recht der Weisthümer und das Hofrecht."

stances of the time, have been frequently related as introductions to new laws. It matters not whether the enactment flowed logically or not from the premises given; the latter afford us, at all events, an insight into the occurrences of the times and the manner of thought of the people. For this kind of knowledge the records of the courts of justice also form an exceedingly valuable source. Civil suits bring to light much of the daily intercourse of a people, especially business methods; while the records of criminal trials reveal at least one side of life in all grades of society, from that of the poor drunken vagabond to that of the defaulting bank president and the political offender of high degree.<sup>1</sup> Furthermore it is patent to any one giving it consideration that there is a close connection between great historical movements, such as the French Revolution, or the various civil wars of England, and the administration of criminal justice.

Another and more valuable method of investigating law is also open to the historian, namely, the philosophical. At the same time it is beset with more danger and must accordingly be more carefully employed. The extent, however, to which this method may be legitimately used and the valuable results therefrom attainable, have been shown with splendid success by Sir Henry Maine. It is no easy matter to read between the lines of the cold and formal language of the law; but he who understands how to read aright can there find the causes which have been the chief determining factors in a nation's history; for here is gradually crystallized that which lies deepest and is most permanent in the lives of the people. Moreover, there are valuable lessons of a general character to be learned from such study. For example, he who is in haste to bring the government of the world to perfection, will learn that the best progress and that producing the most permanent results is of exceedingly slow growth; that where gigantic strides in political life have been hastily made, they have overstepped their aim and necessitated a painful reaction. On the other hand it will be seen that there is a law of general progress at work in the world, even though we have sometimes to contemplate the sad spectacle of an individual nation's decay. As the individuals of the present are the inheritors of the experience of their ancestors through all the past, so are the nations now existing the recipients of the world's national experience since the dawn of history. If the present has not profited as much as it might have done from the struggles, defeats and triumphs of the past, it is nevertheless true that no student of history but the most confirmed pessimist, can deny that the present gen-

<sup>1</sup> Stephen, *History of the criminal law of England*, I., 417. "Many of the trials which took place in the reigns of William III., Anne, George I., and George II., are deeply interesting on many accounts, and especially on account of the strong light which they throw, not only on the history, but still more on the manners of the time." ("The manners of the time," we venture to suggest are an important element, and not something outside, of history.) p. 418. "The private trials which took place during this period were of extraordinary interest, and set the manners of the time before the reader with an authenticity and life which, in my opinion, is more curious and entertaining than any romance ever written."

eral condition of mankind, at least in Christendom, is much superior to that at any period of the past. With oriental nations the case has been different. There, religion at an early period got the upper hand and suppressed the natural development of the peoples; for religion, as the supposed direct revelation of a perfect divinity, can logically admit of no improvement; hence the conservatism of every form of religion and its contest with the advance of science; hence also the eventual stagnation or retrogradation of nations under priestly rule. But as Japan has within the present century greatly improved under the influence of western stimulus, has abolished its feudal institutions, and even given up its state religion, there is ground for hope that the law of progress, though never so slow in its working, will also in the Orient hold good.

In the study of law one finds also well illustrated the working of good out of evil; how evil circumstances occasion the passage and enforcement of good laws; and on the other hand, how unrighteous laws work out their own reform through the evil they occasion.<sup>1</sup> The intimate connection of the various classes of society and the wide-reaching influence of apparently unimportant actions receive here also illustration and proof. He who would deny that society is an organism should take the trouble to trace out as far as possible the effect of single laws; and it is likely he would soon become convinced of his error, if indeed his mind were not already closed to the reception of new truth. A case occurred some years since in New Hampshire, which affords an excellent illustration of the point in hand. In the summer of 1885 the legislature of that state passed a so-called "valued policy" law, which "forbade any outside insurance company to apply for the removal of a suit to which it was a party from the State to the Federal courts, on penalty of a revocation of its license, and provided that in any suit brought in the State courts against an insurance company to recover for a total loss sustained by fire or other casualty to real estate or to buildings on the land of another, the amount of the damage should be the amount expressed in the contract as the sum insured, and no other evidence should be admitted on trial as to the value of the property insured." The consequences flowing from this law have been of wide range and various character. The outside companies fearing a great increase of fires and consequent

<sup>1</sup> A good case in point is given in Stephen, I., 415-16. "By the end of the [17th] century the evils of judicial corruption and subserviency, and the horrors of a party warfare carried on by reciprocal prosecutions for treason, alternately instituted against each other, with fatal effect, by the chiefs of contending parties, had made so deep an impression on the public imagination, that a change of sentiment took place which from that time effectually prevented the scandals of the seventeenth century from being repeated. I have dwelt at length upon the second half of the seventeenth century because it was from its troubles and scandals that a better system arose." Arnold, *Recht und Culturleben*, 152. "Und gerade der Absolutismus legte den Grund zu einer gemeinschaftlichen Bethellung Aller an den öffentlichen Interessen, während es bis dahin nur eine Vertretung einzelner Corporationen und Stände gegeben hatte. Das moderne Repräsentativsystem wäre ohne den vorausgegangenen Absolutismus nicht möglich gewesen."

losses through incendiarism, withdrew from the state. As the policies on valuable property ran out, the owners found it impossible to renew their insurance. Manufacturers threatened to remove their works to other states; the owners of summer hotels were in great straits and, according to report, would gladly have sold their property. What is certain is, they refused to spend money on proposed improvements because they considered their investments unsafe. One good result there has been. The owners of property, fearing losses, exercised greatly increased diligence against accidents by fire, with the astonishing result that the number of fires decreased sixty per cent. Another point was brought out, going to show the important consequences of apparently unimportant actions. It is alleged that the law was proposed merely as a threat, to force money as bribes from the foreign insurance companies. The latter refused to become parties to any such black-mailing scheme, and the bill became law—with what results we have already seen.<sup>1</sup> If one law in one year could have such effect, it is no illegitimate conclusion to maintain that the whole body of law is one of the weightiest, if not the very foremost, of all the factors entering into national life; and hence a correspondingly important source of history.

But why should the law occupy this unique position? Expressed in general terms, it is because it lies in the very nature of man himself. In the realm of Nature there must be order, for chaos means destruction. Likewise in society there must be order, for anarchy also means destruction. Order in the material universe is secured by uniform courses of action which are styled the laws of nature; and the action of these uniform laws under varying conditions produces multiformity. So, too, order in society is secured by general rules of action, or laws, which in their action upon different individuals also produce multiformity. Nor is human law at all the arbitrary, matter-of-chance thing it at first sight appears to be. A study of comparative jurisprudence demonstrates that the genius of a people (*Volksgeist*) counts for a great deal in legal development; the next strongest factor is the pressure of circumstances; while the arbitrary will of individuals has but little permanent effect, no matter how great their power for a time may be.<sup>2</sup> Kindred peoples under like circumstances have had practically the

<sup>1</sup> The authority for these statements is found in articles which appeared in Nos. 1054, 1064, 1067, and 1077 of *The Nation*. A case in point is given by Reeves, *History of English law*, II., 158.

<sup>2</sup> Gibbon, *Decline and fall of Rome*, ch. XLIV. "Once, and once only, he [Augustus] experienced a sincere and strenuous opposition. His subjects had resigned all political liberty; they defended the freedom of domestic life. A law which enforced the obligation, and strengthened the bonds of marriage, was clamorously rejected." Buckle, *History of civilization in England*, I., 358. These princes [James I., and Charles I.] exhausted their strength in struggling against the tendencies of an age they were unable to understand; but happily the spirit which they wished to quench had reached a height that mocked their control." *Ibid.* 381. "If we look only at the characters of the rulers, and at their foreign policy, we must pronounce the reign of Charles II. to be the worst that has ever been seen in England. If, on the other hand, we confine our observations to the laws which were passed, and to the principles which were established, we shall be obliged to"

same laws;—as witness, for example, the existence of feudalism and the power of the Church in all the countries of western Europe during the Middle Ages. The fact is that almost all the relations of life, those of the family, of the individual toward the state, and those of the business world, are legal relations; and the laws must therefore exist, if not for their immediate regulation, at least for their protection. Accordingly if the entire really effective law of any people were known, there could be no better source for the true understanding of that people's history. To be sure there have existed many laws which were dead letters from the time of their enactment, and others that have become so through changes of time and circumstances. The laws must hence be studied with care; but the rule as to their value generally remains none the less true. Here then lies the basis of the argument. With the exception of matters of religion, all the important relations of life are legal relations; and even religious institutions are subject to legal provisions; hence the most accurate knowledge of the life of a people, which is the proper subject of history, is to be gained by a study of their law.

Growth of civilization means an increase in the complexity of the relations of individuals;<sup>1</sup> so there must be a corresponding increase in the laws affecting those relations. Compare for an instant the life of a savage with his monotonous round of hunting and fishing, eating, drinking, sleeping and dancing, to that of a business man of to-day;—the latter perhaps head of a manufactory, director of a bank, of an insurance company, and stockholder in other business companies; to these, add his duties as a citizen, perhaps a legislator, and his relations toward polite society;—and it will be seen that the increase in complexity of the relations of life has become enormous during the advance from savagery to civilization. This difference is strikingly manifested in the respective laws of different peoples, or in the laws of the same people at different periods.<sup>2</sup> At an early stage of progress the

"confess that the same reign forms one of the brightest epochs in our national annals." *Ibid.*, 387. "Such writers [political compilers] do not perceive that the history of every civilized country is the history of its intellectual development, which kings, statesmen, and legislators are more likely to retard than to hasten; because, however great their power may be, they are at best the accidental and insufficient representatives of the spirit of their time; and because, so far from being able to regulate the movements of the national mind, they themselves form the smallest part of it, and in a general view of the progress of Man, are only to be regarded as the puppets who strut and fret their hours upon a little stage; while, beyond them, and on every side of them, are forming opinions and principles which they can scarcely perceive, but by which alone the whole course of human affairs is ultimately governed." See also Tolstoi's elaborate appendix to *War and Peace*.

<sup>1</sup> Herbert Spencer, *First Principles*, §122. "As we see in existing barbarous tribes, society in its first and lowest form is a homogeneous aggregation of individuals having like powers and like functions. . . . Beginning with a barbarous tribe, . . . the progress has been, and still is, towards an economic aggregation of the whole human race; growing ever more heterogeneous in respect of the several functions assumed by separate nations, . . . by the local sections of each nation, . . . by the many kinds of makers and traders in each town, . . . by the workers united in producing each commodity."

<sup>2</sup> This is well illustrated by the growth from the Twelve Tables to the *Corpus juris civilis* of Rome; or the growth from Bracton to the English and American law of the present.

most important relations are of the individual, or rather of the family, to the community; for the family as a whole is responsible for the conduct of its individual members,<sup>1</sup> and forms the unit of social organization. The law is therefore in the main, if not entirely, public law; as witness what we know of early Grecian law, or what is left us of the Twelve Tables of Rome. On the other hand, take up the statute-book of any civilized country of to-day, or the *Corpus juris civilis* of Rome, and see what a tremendous proportion is occupied in treating matters affecting the relations of individuals to each other. We can judge then pretty accurately of the stage of a people's civilization at any period from an examination of its contemporary laws.<sup>2</sup> The patriarchal system, so characteristic of primitive societies, can not continue in the face of the multiplied activities of advanced civilization. Even the deeply-rooted *patria potestas* of ancient Rome had to give way gradually before the increasing importance of the individual, as the relations of society became more complex.<sup>3</sup> Feudalism appears to have been an attempt to organize the people of a whole country on the patriarchal plan, wherein every member had his place, his rights and his duties; and the laws were minute in regulating each. The individuals again demanded recognition as such, and representative systems of government have been slowly evolved, with an almost constantly increasing tendency toward democracy, or, better expressed, toward self-government. Whether the latter is to be the final form of government is of course open to doubt. Or whether the civilized world will again see a patriarchal state, though of a new species, *i. e.* a state governed according to the ideal of the socialists; or whether the ultimate condition of society will be one in which the individual will be really supreme, and, according to the ideas of Mr. Herbert Spencer, all action whatever be the result of voluntary will on the part of the individual, only the future can decide. It is true, however, that each stage of the world's history has been marked by the existence of characteristic laws and their embodiment in corresponding institutions; accordingly a study of those laws must reveal a picture of the time at which they were in force.<sup>4</sup>

<sup>1</sup> Even among the ancient Germans, where the family was not the unit of state organization, family responsibility existed. See von Schulte, *Lehrbuch der deutschen Reichs- und Rechtsgeschichte*, 3te Aufl. S. 30. Waitz, *Deutsche Verfassungsgeschichte*, 2te Aufl. I., 442. At the present time the doctrine exists among savage peoples, as among the Goajira Indians, where "the whole caste [is] responsible for the acts of any single member." *The Nation*, No. 1077, p. 152. In old English customary law, responsibility for each others' acts was extended to all the members of the same guild or merchants of the same borough or city. See Reeves, *History of the English law*, II., 113, 114.

<sup>2</sup> Arnold, *Recht und Wirthschaft*, 29. So hängt vor Allem die Bedeutung der beiden wichtigsten Institute, des Eigenthums und der Verträge, aus denen eigentlich das ganze Privatrecht besteht, auf das Engste mit den Culturzuständen zusammen." Arnold, *Cultur und Rechtsleben*, 61. "Man braucht nur die Namen Nomaden-, Akerbau- und Handelsvölker auszusprechen, um sofort an patriarchalische, aristokratische und demokratische Verfassungen erinnert zu werden."

<sup>3</sup> Puchta, *Institutionen*, II., § 282. Rudorff, *Römische Rechtsgeschichte*, II., 326-7.

<sup>4</sup> Arnold, *Recht und Wirthschaft*, 28. "So liegt auf der Hand, dass der Rechtszustand bei seiner Abhängigkeit von dem übrigen Leben nur ein Ausdruck der jeweiligen Cultur eines Volkes sein kann."



Not only may the general features of an age thus be sketched in broad outlines, but the picture can sometimes, from the same source, be completed in its details. The provisions for the prevention and punishment of crime, for instance, are excellent indicators of the general temper of an age and people;<sup>1</sup> not only so, but of particular times and circumstances. An undervaluing of human life marks the primitive nature of the present frontier life in America, analogous to that so characteristic of the early laws of England,<sup>2</sup> of Rome,<sup>3</sup> and of Greece.<sup>4</sup> The causes are not difficult to find. A sparse population, whose most valuable possessions consist in movables widely scattered, must rely on the honesty of the individual for protection. When this reliance is forfeited the guilty individual must be got rid of. As practically all the members of the community are occupied with their private affairs, there is no disposition, no time or money for the establishment of prisons and reform institutions. There remain therefore only two courses open—banishment from the community or death. It is not, then, that the comparatively wild life of primitive society makes people necessarily bloodthirsty and their laws accordingly cruel; it is probably fully as much the force of circumstances which dictates the most practical method of solving a difficulty inherent in the situation. Where torture is practiced, then it, to be sure, marks a cruel instinct in the people themselves. The refinements of torture are, however, no less characteristic of the courtly Spaniards of the sixteenth and seventeenth centuries than of the aboriginal savages of America; and illustrate the fact that the worst side of human nature can at all periods come to the surface. This much, however, can be maintained, that on the whole, the advance of civilization tends to lessen the practice of cruelty.<sup>5</sup> A closer examination of the criminal laws of a country leads us further, and enables the investigator to trace the phases of thought at various times uppermost in the minds of the community. As a good example thereof, may be cited the legislation in England for the punishment of offences against religion during the century following the Reformation; Henry VIII.'s struggle for supremacy, the rule of the churchmen under Edward VI., Mary's restoration of Catholicism, Elizabeth's endeavor to establish peace between all parties for the general strengthening of the nation, and so on, with the alternating success of various sects till the Restoration,—all are minutely portrayed in the law books of the time. In a similar manner can the various phases of the claims and allowances of the prerogatives of royalty be traced in the statutes of treason, etc.<sup>6</sup> The

<sup>1</sup> Stephen, *Crim. Law*, III., 60, speaking of the law of justifiable homicide, says: "The contrast between the earlier and the later form of the law on this subject thus marks the gradual progress of a change in the national manners."

<sup>2</sup> *Ibid.* III., 169. Reeves, *Hist. of the English law*, I., 120.

<sup>3</sup> Stephen, I., 9 et seq. Moritz Voigt, *Die XII. Tafeln*, I., § 5, p. 40, and § 50, pp. 481 et seq.

<sup>4</sup> The laws of Draco, "written in blood."

<sup>5</sup> The causes of this phenomenon are enumerated and discussed by Buckle, *History of civilization in England*, ch. iv.

<sup>6</sup> Stephen, I., 14.

elements which go to make up civilization are so numerous and their relations so different at different times, that the historian can not well do otherwise than examine them analytically. All these elements have their exponents in the law; and though the connection of the law is closer with some than with others, it will be found that the study of the law is able to throw more or less light upon all.

To the average American, no two elements of life seem more widely separated than law and religion; but even here investigation brings to view unexpected results. In primitive society the ideas of religion, morals and law are so blended that it is impossible to separate them.<sup>1</sup> The rules of life are not yet recognized as general principles leaving room for freedom of action in detail. In social development, the particular takes precedence of the general, so that the customs of rude societies regulate each particular observance for itself,<sup>2</sup> without any attempt to systematize the whole.<sup>3</sup> An act contrary to custom is at the same time an offence against the gods and a breach of the laws. Even at a later stage of social development, the judges are presumed to receive their authority and wisdom direct from the gods;<sup>4</sup> while the continuance till a recent period of the doctrine of the divine right of kings, is but another form of the same subtle connection between law and religion. Even after the theoretical recognition of the severance of these elements, their actual connection remains in force.<sup>5</sup> Without reference to the relations of church and state still existing through-

1 Maine, *Ancient Law*, 16. "Quite enough too remains of these collections [ancient legal codes] both in the East and in the West, to show that they mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character; and this is consistent with all we know of early thought from other sources, the severance of law from morality and of religion from law, belonging very distinctly to the later stages of mental progress." Arnold, *Recht und Culturleben*, 249. "Auch das Recht hängt mit dem Glauben des Volkes ursprünglich nah zusammen, und seine Symbole haben ebenso wie die Bräuche der Sitte meist eine directe Beziehung zum nationalen Cultus."

2 Maine, *Ancient Law*, 368.

3 Stephen, III., 212. "It has often struck me as singular that in proportion as we go far back in legal history the law appears to become more and more intricate, technical, and minute in its details," and more and more vague in its general principles. Albert Shaw, *The American State Legislatures*, *Contem. Rev.*, Oct., 1889, p. 559. "It was long very difficult for the people of the American commonwealths to perceive the evils of local and private legislation, or to distinguish clearly between the domain of general and that of special enactments. . . . The great bulk of the earlier legislation was of a private, or special, or local character. . . . It remained for the newer states, in their plastic and formative stage, to show the older ones how entirely dispensable is legislation of this character."

4 Herbert Spencer, *First Principles*, § 122. "All ancient records and traditions prove, the earliest rulers are regarded as divine personages. The maxims and commands they uttered during their lives are held sacred after their deaths, and are enforced by their divinely descended successors; who in their turns are promoted to the pantheon of the race, there to be worshipped and propitiated along with their predecessors; the most ancient of whom is the supreme god, and the rest subordinate gods."

5 *Ibid.* "For many ages religious law continues to contain more or less of civil regulation, and civil law to possess more or less of religious sanction; and even among the most advanced nations these two controlling agencies are by no means completely differentiated from each other."

out the largest part of Christendom, it is nevertheless true that the two continue to exercise mutual influence upon each other. The effect of Christianity on the legal systems of modern Europe and of America admits of no question.<sup>1</sup> It can not be doubted, also, that the rule adopted by the German authorities of the sixteenth century, that the religion of the prince should be the religion of his people, had an important influence in determining the religion of thousands of Germans. The difference between Greek and Roman Christianity has been ascribed to the difference between Greek philosophy and Roman law.<sup>2</sup> In the present, when the practice of religious toleration is practically universal, the mutual effect of law and religion upon each other is probably not so great. However this may be, it still remains true, that much of the people's religious feeling finds expression in the laws establishing and regulating religious and charitable institutions; and accordingly furnishes material for investigating the history of the period. To go back to the days of pagan Rome, we find religion spoken of as a "state institution;"<sup>3</sup> and the close connection of the functions of the priests with the conducting of all affairs of state, is well known. Furthermore, the entire criminal law was in the last instance based on the religious idea of expiation.<sup>4</sup> The long struggle between paganism and Christianity, the final triumph of the latter, the contests of the sects, the separation of the churches of the East and West, the gradual establishment of the supremacy of the Roman bishop, are all reflected in the laws.<sup>5</sup> The formation of a large body of canon law is one of the best evidences of the intimate connection of law and religion;<sup>6</sup> while the fact that there was a

<sup>1</sup> Stephen, II., 474. "It was decided in *Cowan vs. Milbourne* that a person was justified in refusing to carry out a contract to let certain rooms because the plaintiff proposed to deliver in them lectures, the titles of two of which were advertised as follows: 'The Character and Teachings of Christ; the former defective, the latter misleading.' 'The Bible shown to be no more inspired than any other book.'"

*Ibid.*, II., 191. "A denial of the truth of Christianity, depraving the book of Common Prayer, and some others are statutory offences." See also *Ibid.*, 475, and Lord Kenyon's charge to the jury in *Rex vs. Williams*, quoted in *Ibid.*, 473.

<sup>2</sup> Maine, *Ancient Law*, 357. "I affirm without hesitation that the difference between the two theological systems is accounted for by the fact that, in passing from the East to the West, theological speculations had passed from a climate of Greek metaphysics to a climate of Roman law."

<sup>3</sup> Mommsen, *Römische Geschichte*, II., 418. "Nur eine weitere Entwicklung desselben Grundgedankens ist die varronische Theologie, in der die römische Religion durchaus behandelt wird als ein Staatsinstitut."

<sup>4</sup> *Ibid.*, I., 170.

<sup>5</sup> Puchta, *System und Geschichte des römischen Privatrechts*, § 216, a. Rudorff, *Römische Rechtsgeschichte*, I., 254. Baur, *Geschichte der christlichen Kirche*, 3te Ausg. I., 438, 454 *et seq.*, II. (2te Ausg.) 250.

<sup>6</sup> Maasen, *Geschichte der Quellen und der Literatur des canonischen Rechts*, I., 309. "Das bürgerliche Recht schöpften Kirche und Clerus aus den in Uebung befindlichen weltlichen Rechtssammlungen; bis im 9. Jahrhundert auch Sammlungen des römischen Rechts entstanden, die nur für den kirchlichen Gebrauch bestimmt waren." Von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts*, II., 26. "Man kann wohl sagen; es gab kein Rechtsverhältniss, keine Seite des sozialen und auch staatlichen Lebens, dass sich nicht unter irgend einem Vorwande zur Kompetenz des Klerus ziehen liess."

long period when the clergy monopolized legal as well as other learning, has left its unmistakable impress on much of modern law.

When attention is directed to the business world, its close relations with law are at once apparent. If there is one department of human activity wherein system is more necessary than in another, it is in business. Whether the work is that of the producer of raw materials, or that of the manufacturer or the middle man, system is the first condition of success; and the natural result of systematization is, sooner or later, embodiment in law. In primitive communities business takes the form of barter and is regulated by custom. The growth of civilization brings about statutory regulations of business as of other relations in society. The aims sought to be reached by the statute laws at different periods of historical development have been very various, and their methods as different. As a whole, the progress has been from a system of exact regulation of private and local details to one of general rules for the good of the business community and the protection of society; from the strict formality of Roman and Mediaeval law to the greater freedom allowed the individual in the present.

The success of business depends largely on the ease of communication between individuals; for this purpose a common centre or meeting-place must exist; and to this necessity the world is largely indebted for its city life, with all for good and evil thereby denoted. If Mommsen's theory is correct, it is to the trading spirit of the ancient Italians that, if not the founding, at least the importance of Rome was due.<sup>1</sup> Certainly Tyre and Carthage owed their greatness to business enterprise. Coming down to later times, it is said that the city-building emperor of the Germans in the tenth century forbade the following of trades in the country districts, so that the newly founded marts, through a monopoly of manufactures, etc., might increase so much the more rapidly.<sup>2</sup> The followers of each particular line of activity, from that time on, were formed into a corporation or protective association, by which their affairs were strictly regulated; and within its own province each corporation was practically absolute. So far as the regulations of such companies are known to us, they assist us in drawing a picture of the condition of Europe for the centuries during which they flourished. From the making of shoes to the building of cathedrals or the writing of poetry, the activities of Christendom for several centuries were practically regulated by the guilds. Though each guild could be strict or even tyrannical in controlling its own affairs, it would not patiently submit to interference from outside, even from the highest authority. Accordingly in their struggle for corporate freedom of action they really gained much for the liberty of the

<sup>1</sup> Geschichte Roms, 7te Aufl. I., 46. "Dass Rom wenn nicht seine Entstehung, doch seine Bedeutung diesen commerciellen und strategischen Verhältnissen verdankte, davon begegnen denn auch weiter zahlreiche Spuren."

<sup>2</sup> See Waitz, *Jahrbücher des Deutschen Reichs unter König Heinrich I.*, 3te Aufl., 1885, 97-98.

individual.<sup>1</sup> Moreover, as the cities increased in size and wealth, the corporations advanced in importance, so that in the end, guild law became city law.<sup>2</sup> That the original English charters of America were charters for trading companies is well known;<sup>3</sup> and on this basis rests a large part of the present state constitutions of the United States. From the Reformation on, the guilds gradually lost their commanding position. They had served an important end in the world's history, but when in power overstepped their bounds, became tyrannical and were finally put aside to make way for state regulations of trade and manufactures. For the individual, however, the change was from one tyrannical controller to another; for the various states interfered with the natural course of business to an immense extent.<sup>4</sup> Adam Smith led the way theoretically and the American and French Revolutions practically, to a better understanding of the conditions of material prosperity. The ideal condition has by no means even yet been reached; but the individual has gained immensely in the freedom of control of his own business affairs.

The change of the ideal to be striven for necessitated an alteration in the method of proceeding. The wide-spread acceptance of the doctrines of Adam Smith was the first step; the practical change of national policy followed more slowly. The doctrines of protection and of state regulation have as a rule been closely connected. Though the United States have separated them, and given practical freedom from state control, while maintaining a system of high tariffs, the countries of continental Europe retain still to a considerable extent the idea and practice of parental oversight and control. On the whole, however, it is safe to say that the general tendency of recent times has been toward an increase of individual freedom; and not only that, but an increased recognition of the business community's ability to regulate its own affairs. It is not that the state does not interfere at all now, but it does so through general and not special laws, merely individual in their application. England led the way in this movement, in whose

<sup>1</sup> Wilda, *Das Gildenwesen im Mittelalter*. "Das Gelags-oder Gildhaus (*domus convivii*) war und blieb noch längere Zeit der Mittelpunkt der Stadtbewohner, die . . . gegen die Eingriffe, die Mächtige auf ihre Freiheit machten, zu schützen, sich enger unter einander verbanden."

<sup>2</sup> Wilda, pp. 145, 152.

<sup>3</sup> For Massachusetts see Brooks Adams, *The Emancipation of Massachusetts*, 20 *et seq.*

<sup>4</sup> Colbert's policy in France is thus summarized by Sybel:—"Um den Absatz nach aussen zu sichern, schrieb er überall die Art der Fabrikation auf das Genaneste vor; um die Concurrrenz von aussen her zu beseitigen, trat er mit einer Menge von Verboten und Schutzzöllen dazwischen." Stephen, III., 203. "Till within living memory, it was considered to be the special duty of the [English] legislature to regulate all the most important matters connected with trade and labor." See special cases of interference, *Ibid.*, II. 206. Also a curious law of the German Empire, 1555, called the "Polecey Ordnung" in *Corpus juris publici*, von Franken und Schumann, Leipzig, 1774. For early English regulations of wages, etc., Reeves, *History of the English Law*, II., 388 *et seq.* For the growth of American law from the special to the general, see Albert Shaw, *The American State Legislatures*, *Contemporary Review*, Oct., 1889. For the change in general, see Richard T. Ely, *Political Economy*, 73.

courts for centuries the law-merchant has been recognized as a part of the common law, and as such, admissible of proof in court as to the customs of merchants. The great increase in the frequency of employment of arbitrators for the settlement of all kinds of disputes, from those between laborers and their employers to international difficulties, marks an important advance of the present century in the same direction.

There is also another point of view from which the relations of law and business should be contemplated, viz., that change wrought by the modern increase in the importance of business, not only absolutely but relatively to the entire activity of the community, and the accompanying general changes in social conditions. In the ancient and Mediaeval world, war and politics were the chief employments of the citizen, while a few devoted their energies to the cultivation of philosophy or religion; and the industrial population, on whose toil depended the subsistence of all, was composed of slaves, serfs, or at best of a menial class which was regarded rather as a necessary evil than an important element in the prosperity of the community.<sup>1</sup> With the growth of cities and the corresponding increase of trade and manufactures, and therewith, of the classes devoted to these pursuits, there has necessarily arisen a change in the ideas and relations of society, so that to-day, in the United States at least, those engaged in commerce or manufactures occupy the most important position in public thought. Commerce demands peace for its prosperity, and must therefore be the enemy of war. The devotees of war, in other times, were the possessors of landed property from which they drew their revenue, while at the same time they could give themselves up to the pursuit of arms. The activities of manufactures and commerce require much more exacting devotion and personal attention on the part of those engaged in them, than the possession of realty, and probably suggested if it did not necessitate the first employment of paid substitutes to bear arms; while still later arose in Italy, whose cities were the first in modern times to gain great prosperity by trade, the practice of employing mercenary troops in general. The separation of the occupations of industry and of arms made its way slowly but surely throughout the countries of Europe. There were of course fundamental social changes taking place at the same time. The decline of the warlike spirit has been marked in general by a decline in the barbarous methods of conducting warfare, which finds most significant expression in the laws and orders regulating the command of arms not only in times of peace, but also in times of war, and in the more humane and considerate treatment alike of friend and foe. One of the greatest services that the increased importance of business has rendered to humanity is the higher value it has caused to be placed on human life; the reason of this is the doctrine that every individual is to be looked upon as

<sup>1</sup> Puchta, *Institutionen*, 9te Aufl., I., 129. "In den Händen dieser vornehmlich waren die Gewerbe, mit denen kein von Freigebornen Stammender sich befasste, mit Ausnahme etwa der in Rom sich ansiedelnden Fremden; Handel und Gewerbe waren gering geschätzt, und durch diese Missachtung Patriciern und Plebejern untersagt."

a possible producer of something valuable to the life and comfort of the community. This is reflected not only in the modern laws punishing petty offences against decency, but also in those enactments intended for the protection of life and health in mines, manufactories, etc., as well as in the provision for foundlings and other unfortunates. But this change in social conditions, which has been so largely the result of increased business activity, has had if possible a still more extensive consequence in national life, which also finds its best reflection in the law, viz., the founding of national debts and modern financial systems. So long as rulers had private estates and incomes sufficient to carry on the government, and every citizen was a soldier prepared to pay his own expenses; when the booty of a successful campaign would more than repay the output, and the results of an unsuccessful one were borne with the hope of retrieving the misfortune at a later period, national debts were unheard of. When, however, a large class withdrew from military life, and preferred paying money to assuming the personal work; when in consequence of this, and of the changed mode of warfare, standing armies arose, which had to be paid in times of peace as well as during war; then it was that the uncertainties and misfortunes of war caused the contracting of national debts, which have in the course of a century and a half increased to enormous proportions, and caused a revolution in national financial systems. This alteration in turn brought about the inauguration of a new form of government which is one of the main features of modern civilization, *i. e.*, representative government.<sup>1</sup> However the individual circumstances in the various countries may have differed, the real cause and the ultimate effect have been practically the same in principle, though various in detail. The methods of electing representatives, for example, vary from the universal suffrage in America with direct representation, to the suffrage founded on a money and intellectual basis with election by delegated electors, of Prussia. The idea is, however, everywhere the same—the people who are to pay the money, claim the right to determine how much they will pay and in what manner the sum will be expended.

There seems to be in human nature an instinctive desire to gain wealth without performing the labor which is its natural equivalent. This feeling was represented for ages by the alchemists. Their efforts proving futile, other methods were tried. Conspicuous among these was the system of chartering corporations and giving them a monopoly. The system of guilds was also, in part at least, representative of the same idea. For the very fact of their exclusiveness, combined with the restriction of employment to members only, shows the determination to sell labor or wares, as the case might be, at a higher figure than they would bring under a system of free competition. In like manner the idea has broadened its scope till the various nations have formed themselves into what might be termed national guilds, under their systems of protective tariffs, by which each seeks to

<sup>1</sup> See a striking illustration of this in Seeley, *Life and Times of Stein*, II., Ch. III.

become rich more rapidly than it would do under a system of universal competition, or free trade. This is not the place to discuss the arguments pro and con of protection. The subject is mentioned merely as furnishing an excellent illustration of the importance of an understanding of law in connection with history. This governmental fostering of certain industries has been the cause not only of wars between nations, but of sanguinary troubles within national borders; it has also aided in the corruption of morals, as for example, by causing extensive smuggling, at one period in England. On the other hand, it has built up great industries which have given employment to thousands and bread to hundreds of thousands. The idea of raising artificial barriers to the effects of free competition has run its course, from the individual alchemist, through the community or guild, to the nation; and has again taken hold of the individual imagination, and found expression in the various forms of labor organizations. The avowed object of the latter is to give labor power to defend its rights against capital. But that the fundamental principle is to free the members from the effects of unlimited competition, will be seen by any one who gives the subject attention. The many strikes of thousands of "union men" have demonstrated beyond a doubt what was indeed earlier known, but not so plainly exhibited, viz., that the strikers are contesting for their own ease and comfort. It has generally been found possible to supply within a reasonable time the places of the strikers, if only safety were secured to the "non-union" men. In other words, organized labor refuses to recognize the truth of the law of demand and supply, and demands certain returns for work whether there are ten men or only five ready to perform a given service which five can do just as well as ten. The system would work very well for the five who could control a monopoly of the said service, if the other five could be got rid of; just as protection would produce magnificent results, if only one country were capable of enacting and enforcing protective laws and could accordingly profit by the free competition of all the rest. The spread of protection principles through all countries, large and small, however, diminishes, if it does not nullify, the advantage of each. The entire labor movement has naturally an immense influence not only on the lives of the individual workers but also on the national development. The drift of public opinion from time to time, the attempted remedies for the evil condition of labor, the trial to suppress and later to regulate labor organizations, are all to be studied in the laws, especially of England, where labor laws of many descriptions have been successively passed, modified and repealed.<sup>1</sup>

This struggle to obtain wealth by artificial means forms but by-paths of the great highway on which millions have travelled toward the acquirement of earthly possessions. The development of the various forms of industry by which man has sought to increase his wealth has been one of the most important elements of civilization. The accumulation of wealth

<sup>1</sup> Stephen, III., 203, 226-7.



in some form is the very foundation of advancement in civilization; for until the moment when such a store enables its possessor to have leisure for some other pursuit than supplying his immediate wants, the first step toward civilization is impossible. Family rules, compacts as to future conduct, as the understanding between Abraham and Lot, pave the way for general laws for the ordering of general industry. Such rules and laws, where open to the investigator, furnish a treasure for the student of history, which enables him to judge of the condition and relations of the people whose laws they are.

Such laws are not only a result of voluntary, individual action in the past, but also a strong factor in the development of the future. Take for instance the growth of the *jus gentium* in Rome,—at first the result of the coming of foreign traders to that city, and in turn the cause, or at least the foundation, of much that is best in modern law;<sup>1</sup> for the *jus gentium* became the most practical part, for the business world at least, of the Roman law, and the Roman law has in turn become the common law of most of continental Europe, has exercised great influence on English, and through that on American and Indian law, as well as formed the very bone and marrow of modern international law. The desire to gain wealth has had also other and more direct influences on modern law and civilization than through the Roman law. Not to speak of the compulsory opening of China and Japan to international trade, with its great effect upon those countries, we can trace to the same source much of the modern comity of nations. Not only does the intercourse brought about by the desire to trade, break down the barriers of national prejudice and thus open the way to mutual good feeling, but the expectation of deriving material advantage therefrom is an exceedingly important factor in establishing friendly relations between foreign powers. Though many private actions may arise out of high motives of benevolence, it will be difficult to trace the springs of national action to such a source. On the contrary, if we except perhaps the assistance given to Greece in her struggle for liberation from Turkish rule, it will be difficult to find any important colonial or international event of the present age which cannot be attributed with justice to the hope of national gain, or what amounts to the same thing, a fear of national loss. The pursuit of wealth, whether by individuals or communities, has been sometimes advanced, often injured, but always reflected by the laws; so that, whatever its effect may have been, commercial law remains extremely valuable as an exponent of an important portion of individual and national life.

One of the most noteworthy distinctions between the ancient world and the modern is to be found in the more important rôle that business relations play in the latter. Not the least weighty of the results of that renewed activity in Christendom usually designated by the term Renaissance, was the fact that new ideas gave rise to new wants which were only to be satisfied by increase in business activity. Figuratively speaking, war and commerce

<sup>1</sup> Puchta, *Institutionen*, I., § 83 *et seq.*

lie on opposite sides of a balance, so that as one rises the other falls. War, which for ages, was not only the most frequent but also the most honorable occupation, is now generally looked upon as at best, a necessary evil; while on the other hand, trade and manufactures, which were considered fit occupations only for menials, have assumed an importance second to none among national interests; and this remarkable change is well reflected in the laws. They have furthermore an important reflex action. Though the days are probably past when a civilized country would enact such laws as the Navigation Laws of England which brought on the war with the Netherlands in the middle of the seventeenth century (1652-54), one can in modern commercial law still find the basis of great changes in national activity. Conspicuous examples of this are the German and French laws allowing a bounty on the export of beet sugar, by which this industry has been stimulated to an enormous extent, and has recently been the principal subject of an international understanding between those countries and England. Witness also the tremendous influence on the business world of the laws authorizing the establishment of the so-called limited companies and of our system of national banks. The list might be almost indefinitely swelled.

What has here been drawn in broad outlines is capable of proof by following in detail the results of individual laws; but that would increase unnecessarily the length of the present article. Enough has been said, it is hoped, to make it evident, not only that the professional historian should know something of law, but that a certain amount of instruction in law would be most valuable, if it is not absolutely necessary, in connection with our university courses in history.

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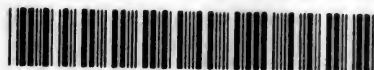
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